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2 **NOT FOR PUBLICATION**

3 UNITED STATES BANKRUPTCY COURT
4 WESTERN DISTRICT OF WASHINGTON
5

6
7 In re:

8 RAYMOND D. ANDERSEN,
9 Debtor.

No. 05-51161

10
11 NATIONWIDE NORTHWEST
12 LIMITED PARTNERSHIP,
13 Plaintiff,
14 vs.

Adversary No. 06-4044

MEMORANDUM RE DEFAULT

15 RAYMOND D. ANDERSEN,
16 Defendant.

17 Nationwide Northwest Limited Partnership filed this adversary
18 proceeding against defendant debtor Raymond D. Andersen, seeking a
19 determination that his obligation under the installment sale contract is
20 nondischargeable under § 523(a)(2)(A)¹ of the Bankruptcy Code
21 (11 U.S.C.). Mr. Andersen purchased a Jeep Cherokee from a car dealer
22 whose position Nationwide apparently took over.

23
24 ¹

25 Absent contrary indication, all "Code," chapter and section
26 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330 prior to
27 its amendment by the Bankruptcy Abuse Prevention and Consumer Protection
28 Act of 2005, Pub. L. 109-8, 119 Stat. 23, as the case from which the
adversary proceeding arises was filed before its effective date
(generally 17 October 2005).

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1 Andersen did not answer, and I entered an Order of Default (docket
2 no. 6). Nationwide thereafter sought entry of a judgment of
3 nondischargeability. I declined to enter that judgment, indicating by
4 letter (docket no. 13) that the proof appeared insufficient, and
5 inviting further briefing or a prove-up hearing.

6 Nationwide chose the latter, and that hearing was held 6 February
7 2007. James Whitman, Nationwide's General Manager, testified by
8 telephone. Exhibits A and B to his previous declaration (docket no.
9 17), defendant Andersen's credit application and the retail installment
10 contract, were admitted. Because they are already in the record of this
11 adversary proceeding, no physical copies were marked or kept.

12 To establish nondischargeability under § 523(a)(2)(A), Nationwide
13 Northwest must prove:

14 the creditor must establish (1) that the debtor made a
15 representation; (2) the debtor knew at the time the
16 representation was false; (3) the debtor made the
17 representation with the intention and purpose of deceiving the
creditor; (4) the creditor relied on the representation; and
(5) the creditor sustained damage as the proximate result of
the representation.

18 In re Apte, 96 F.3d 1319, 1322 (9th Cir. 1996) (citations omitted).

19 Having considered the evidence and the argument of counsel,
20 including Nationwide's post-hearing memorandum (docket no. 22), and even
21 overlooking disconnects, such as:

- 22 1. The fact that whatever representations Mr. Andersen made were
23 to the car dealer, not Nationwide--he could be liable to
24 Nationwide if he knew or had reason to believe Nationwide was
25 going to rely on his representations, Restatement (Second) of

1 Torts § 533 (1977); In re Maldonado, 228 B.R. 735, 738-39 (9th
2 Cir. BAP 1999), but there is no evidence one way or the other;

3 2. It is not clear that Nationwide advanced any credit pre-
4 bankruptcy (the application was made on 11 October 2006, the
5 bankruptcy was filed on 12 October 2006); and

6 3. Nationwide itself characterizes its transaction as the
7 purchase of the loan made by the car dealer (paragraph 3,
8 Whitman Declaration);

9 Nationwide's case fails.

10 There is no evidence of any oral representations of any sort (no
11 one who took part in the initial transaction between Andersen and the
12 car dealer testified), and there are no written representations in
13 Exhibit A except those respecting his employment. Notably, there is no
14 information about his credit history or financial status, and the
15 questions about bankruptcy, judgments, etc., are unanswered. Nationwide
16 relied on a credit report it obtained, and made its credit decision on
17 that information.

18 Nationwide argues from the timing that at the time of his purchase
19 of the Jeep Cherokee Mr. Andersen must have known he intended to file
20 for bankruptcy, and impliedly represented his intention to continue to
21 be legally bound by the contract, which representation he breached by
22 failing to reaffirm. In fact, his statement of intention (Official
23 Form 8 filed with his petition in the main case, of which I take
24 judicial notice) indicates "debtor will retain collateral and continue
25 to make regular payments." Of course, as Mr. Andersen filed his
26 bankruptcy case before the effective date of BAPCPA, that "third option"

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1 was available in this Circuit. In re Parker, 139 F.3d 668 (9th Cir.
2 1998).

3 Review of the docket in the main case also discloses first, that
4 Mr. Andersen did not seek to exempt the Jeep, and second, that
5 Nationwide evidently failed to perfect its security interest, as the
6 trustee's motion to sell the vehicle (docket no. 11) indicates the
7 trustee was not aware of any liens, and the docket discloses no
8 objection from Nationwide. I ultimately entered an order authorizing
9 the auction of the vehicle (docket no. 23).

10 But even the cases Nationwide cites in its post-hearing brief do
11 not support its position: the two cases quoted (In re Green, 296 B.R.
12 173, 180 (Bankr. C.D. Ill. 2003) and In re Schnore, 13 B.R. 249 (Bankr.
13 W.D. Wis. 1981) speak in terms of intent to pay, rather than intent to
14 be bound, and the third case, In re Wright, 8 B.R. 625 (Bankr. S.D. Ohio
15 1981) was decided on the basis of the debtor's knowing "at the time she
16 made the subject purchases that she was not able to pay for the items in
17 the future . . . (and) without any sincere intention to pay for them."
18 None of these cases, credit card cases all, holds that a debtor
19 impliedly represents an intent to continue to be bound under the
20 contractual arrangement. And Ninth Circuit law is that the debtor makes
21 an implied representation of an intent to perform the contract by
22 repaying the amount charged. In re Anastas, 94 F.3d 1280, 1285 (9th
23 Cir. 1996) (also a credit card case).

24 In this case there is simply no evidence that, at the time he
25 purchased the Jeep, Mr. Andersen did not intend to pay for it. Because
26 it was not exempt, and because Nationwide had not perfected its security
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1 interest, the trustee sold the Jeep, a fact which would obviously have
2 some impact on Mr. Andersen's willingness to continue paying for it. In
3 short, I cannot find that Nationwide has proven that, at the time Mr.
4 Andersen purchased the Jeep, he did not intend to pay for it in
5 accordance with the terms of the retail installment contract.

6 Nor is it evident that Nationwide's reliance on any implied
7 representation was justified. It went ahead with the transaction,
8 notwithstanding Mr. Andersen's failure even to answer the questions
9 respecting bankruptcy, judgments, etc., on his credit application
10 (Exhibit B).

11 Accordingly, the debt is not excepted from discharge, and I will
12 enter judgment for Defendant Raymond D. Andersen.

13
14 DATED: 8 March 2007.

15
16 

17 Philip H. Brandt
18 U. S. Bankruptcy Judge

19
20 CERTIFICATE OF SERVICE:
21 I CERTIFY I SERVED COPIES OF
THE FOREGOING (VIA U.S. MAIL,
FACSIMILE, OR ELECTRONICALLY) ON:

22 Laurin S. Schweet
23 Email: laurins@schweetlaw.com

Raymond D. Andersen
1411 McMillan
Sumner, WA 98390

24 DATE: March 8, 2007

25 BY: /s/ Juanita C. Kandi
26
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